Dallas Cowboys' Controversy Highlights Trap for Union and Non-Union Employers

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Dallas Cowboys owner Jerry Jones publicly announced last week that he would bench any player who kneels during the national anthem. As a lifelong Cowboys fan, the flap momentarily diverted my attention from the Cowboys' crushing loss in the final minute of the Green Bay Packers game.

Following Jones's decision to publicly draw a line in the sand, a union in Texas filed a charge with the National Labor Relations Board (NLRB), claiming Jones's threat violated players' rights under Section 8 of the National Labor Relations Act (NLRA). More specifically, Section 8 prohibits both unionized and non-unionized employers from threatening to discipline or terminate employees for exercising their rights under Section 7 of the NLRA. The issue in the Cowboys charge is not limited to unionized workforces but, rather applies to all employers.

Since Section 8 essentially protects employees who have exercised their rights under Section 7, an understanding of these Section 7 rights is essential. Section 7 clarifies the rights of non-supervisory employees to engage in concerted activities for mutual aid and protection. Employees have the right to act together to try to improve their wages, hours or working conditions, with or without a labor union. Typically, this action involves two or more employees acting together, but the actions of a single employee may be concerted if the employee involves coworkers before acting or acts on behalf of others. However, the action of an employee must be more than a personal gripe.

Whether Section 7 of the NLRA was implicated in the Cowboys case is unclear. In order for such activity to be protected, it must involve working conditions. The act of kneeling appears to relate to broader societal issues rather than working conditions. However, if other players kneel in support of other players' right to do so, working conditions could be implicated. Likewise, if the kneeling is in protest of the owners' perceived boycott of Colin Kaepernick, the action may implicate working conditions. Perhaps even the fact that the national anthem is played before every game might be seen by the NLRA as a "working condition" that players are protesting, whatever their specific societal objection.

While the outcome of the current charge against the Cowboys remains unclear, employers must exercise caution not to take a knee-jerk reaction when employees engage in some form of protest. For example, non-supervisory employees have the right to discuss their wages with one another and even to sit in the break room and complain about those wages without reprisal. And this right to engage in mutual aid also extends to social media. NLRB settlements in this area range from a construction contractor who terminated five employees after they posted a YouTube video about hazardous working conditions to an EMT who posted derogatory remarks on Facebook about her supervisor, including calling him a "scumbag" after she

was suspended from employment.

Our employment law attorneys routinely advise employers about matters which may implicate the NLRA, including disciplinary and termination issues, and review social media policies for NLRA compliance. Please contact me or any member of the Barley Snyder Employment Practice Group for assistance in this area.

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